Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

No. 82-5576

In the Supreme Court of the United States

OCTOBER TERM, 1982

JEFFREY LEE PICKETT, BY NEXT FRIEND,
FRANCES ANNETTE PICKETT, AND
FRANCES ANNETTE PICKETT, APPELLANTS,

v.

BRAXTON BROWN, APPELLEE

AND

WILLIAM M. LEECH, JR., INTERVENOR-APPELLEE

APPEAL FROM THE SUPREME COURT OF TENNESSEE

JOINT APPENDIX

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APPEAL DOCKETED OCTOBER 18, 1982
PROBABLE JURISDICTION NOTED
DECEMBER 6, 1982

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RELEVANT DOCKET ENTRIES

May 24, 1978

Petition to Establish Paternity filed in the Juvenile Court of Memphis and Shelby County, Tennessee.

June 6, 1978

Juvenile court order transferring case to circuit court for a jury trial on the issue of paternity entered.

April 30, 1979

Defendant filed in the circuit court a motion to dismiss based upon the two year statute of limitations. (This motion was not a part of the record before the Supreme Court of Tennessee.)

May 8, 1979

Circuit court transferred case back to the juvenile court for a hearing on the defendant's motion to dismiss. (This order was not included in the joint appendix but can be found at page three (3) of the technical record before the Supreme Court of Tennessee.)

July 9, 1979

Plaintiff's motion challenging the constitutionality of Tennessee's two year statute of limitations filed in the juvenile court.

April 24, 1980

Juvenile court order declaring two year statute of limitations unconstitutional entered.

June 9, 1980

Supreme Court of Tennessee enters order granting defendant's application for permission to appeal juvenile court order.

August 30, 1982

Supreme Court of Tennessee enters judgment reversing the ruling of the juvenile court.

September 9, 1982

Notice of appeal to the Supreme Court of the United States filed with the Supreme Court of Tennessee.

October 18, 1982

Appeal docketed in the Supreme Court of the United States.

December 6, 1982

Motion of appellants for leave to proceed *in forma pauperis* granted and probable jurisdiction noted by the Supreme Court of the United States.

IN THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY, TENNESSEE

DOCKET NO. 31870

FRANCIS ANNETTE PICKETT, PETITIONER

v.

BRAXTON BROWN, DEFENDANT

PETITION TO ESTABLISH PATERNITY—
Filed May 24, 1978

To the Honorable Kenneth A. Turner, Judge of the Juvenile Court of Memphis and Shelby County, Tennessee:

Your petitioner, Francis Annette Pickett, respectfully represents to the Court that the defendant is the natural father of Jeffrey Lee Pickett, born November 1, 1968 a child (ren) born out of wedlock and that Frances Annette Pickett is the mother of said child(ren).

Your petitioner further avers

PREMISES CONSIDERED, PETITIONER PRAYS:

1. That the defendant be arrested or summoned to appear before this Court to answer the above charge.
2. That the Court find the defendant to be the natural father of said child (ren).
3. That the Court order the defendant to pay such sums for the support and maintenance of said child(ren) and such other expenses as the Court may deem proper.
4. That the name of said child remain the same.

FRANCIS A. PICKETT
Petitioner
2075 King Rd. Southaven, Miss. 38671
Address

AFFIDAVIT

STATE OF TENNESSEE
COUNTY OF SHELBY

Before me personally appeared the petitioner in the foregoing petition, who makes oath that the statements therein are true to the best of her knowledge, information and belief.

FRANCIS A. PICKETT
Petitioner

Sworn to and subscribed before me this 12th day of May, 1978

WILLIAM G. FULMER, CLERK OF COURT

IN THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY

Docket No. 31870

Circuit Court 64761-4 R.D.

FRANCES ANNETTE PICKETT, PLAINTIFF,

vs.

BRAXTON BROWN, DEFENDANT.

PLAINTIFF'S MOTION CHALLENGING THE CONSTITUTIONALITY OF A PORTION OF T.C.A. § 36-224 (2)—July 9, 1979

TO THE HONORABLE KENNETH A. TURNER, JUDGE OF THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY, TENNESSEE:

In this cause a petition to establish the paternity of JEFFREY LEE PICKETT, born November 1, 1968 was filed by the plaintiff on May 12, 1978. On June 6, 1978 the petition was transferred to the Circuit Court of Shelby County at the request of the defendant.

On April 30, 1979 the defendant filed a motion to the Circuit Court to dismiss this cause of action based on the statute of limitations set forth in T.C.A. § 36-224 (2). The Circuit Court entered an order on May 8, 1979 remanding this cause to the Juvenile Court for a hearing on that issue.

The defendant relies upon a clause from T.C.A. § 36-224 (2) which reads:

> ... but shall not be brought after the lapse of more than two (2) years from the birth of the child; unless paternity has been acknowledged by the father in writing or by the furnishing of support.

It is the defendants contention that:

1) since he has never acknowledged the child or furnished any support; and
2) since the child was born November 1, 1968 (more than two (2) years prior to the start of this suit);

that the statute of limitations applies as set forth above and this action is precluded by law.

The Plaintiff's reply is two-fold.

I.

First the Plaintiff would ask to be allowed to amend her petition to bring the paternity suit in the name of her child who seeks to be legitimated.

II.

Second, your plaintiff challenges the constitutionality of so much of T.C.A. § 36-224 as would bar this action. Said statute has two parts in terms of a statute of limitations. The first says a suit must be brought within two (2) years of the birth of the child. The second says if the child is, or is about to become, a public charge then the suit may be brought anytime prior to the child's eighteenth (18th) birthday.

A.

The statute unconstitutionaliy discriminates against the plaintiff and her son denying her and her son equal protection of the law and thus violating the 14th Amendment to the United States Constitution and Article 1, Section 8 of the Tennessee Constitution.

B.

The statute amounts to cruel and unusual punishment in violation of the 8th Amendment to the United States Constitution and Article 1, Section 8 of the Tennessee Constitution.

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as

well as an unjust—way of deterring the parent. 406 U.S. at 175

C.

The statute deprives the child of due process of law in that the child's right to be legitimate is cut off before he is of sufficient age to exercise his right. This is a violation of the 5th and 14th Amendment to the United States Constitution and Article 1, Section 8 of the Tennessee Constitution.

WHEREFORE, PREMISES CONSIDERED, PETITIONER PRAYS that this Honorable Court declare that portion of T.C.A. § 36-224 which seeks to limit this cause of action to that period of time prior to said child's second birthday unconstitutional and remand this cause of action back to the Circuit Court for a jury trial on the issue of paternity.

Respectfully Submitted

HORNE & PEPPEL, P.C.

/s/ HAROLD W. HORNE

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CERTIFICATE OF SERVICE (omitted in printing)

IN THE JUVENILE COURT OF TENNESSEE FOR SHELBY COUNTY, AT MEMPHIS

No. 31870

FRANCES ANNETTE PICKETT, PLAINTIFF,

Vs.

BRAXTON BROWN, DEFENDANT.

ORDER FOR BLOOD TEST AND GENERAL CONTINUANCE
December 3, 1979

In this cause, upon motion of Braxton Brown, defendant, by and through his attorney, request was made that the plaintiff, Frances Annette Pickett, and her child, Jeffrey Lee Pickett, submit to a blood test offered by Dr. Argall at Baptist Hospital, 899 Madison Avenue, Memphis, Tennessee, the defendant having already submitted to such test and the plaintiff and her child having failed to submit to same at the appointed time. It was further moved by the defendant, by and through his attorney, that the plaintiff, by and through her attorney, be required to make such appointments and arrangements with Dr. Argall to submit to, and complete, the series of blood tests begun by the defendant with Dr. Argall. Finally, motion was made by the defendant, by and through his attorney, that a general continuance be granted until such time as the results of the requested blood test be obtained and that any setting for a ruling on the constitutionality of the statute of limitations for Petitions to Establish Paternity be deferred until the results of Dr. Argall's test be obtained and submitted to the Court.

The plaintiff's attorney having not appeared to contest same;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff, Frances Annette Pickett, and her child, Jeffrey Lee Pickett, submit to the blood test begun by the defendant, Braxton Brown, and offered by Dr. Argall at Baptist Hospital, 899 Madison Avenue,

Memphis, Tennessee; that the plaintiff's attorney make arrangements for same with Dr. Argall, the plaintiff and her child; that a general continuance be granted in the cause; that a setting for a ruling on any constitutional issues concerning the plaintiff's cause abide the results of Dr. Argall's test.

This 3rd day of December, 1979.

/s/ _____
JUDGE

/s/ JAMES R. MCGARRH, JR.

Attorney for Defendant
Suite 1930-100 No. Main Bldg.
Memphis TN 38103
526-2126

IN THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY, TENNESSEE

Docket No. 31870
Circuit Court 64761-4 R.D.

FRANCES ANNETTE PICKETT, PLAINTIFF,

vs.

BRAXTON BROWN, DEFENDANT.

MOTION FOR RE-HEARING—Dec. 8, 1979

Pursuant to Rule 12 of the Juvenile Court, Plaintiff moves the Court for a re-hearing on the matter of blood tests and for cause states:

1. That on Thursday, November 29, 1979, a motion was pending before this Honorable Court challenging the constitutionality of the statute of limitations in paternity cases. That was the only motion pending before the Court on that date. Plaintiff's counsel was not present for oral argument as argument had been previously submitted by memorandum.

2. That there was no motion pending before the Court as to the issue of blood tests on November 29, 1979 and thus it was improper for the Defendant to argue that matter before the Court without giving proper notice to adverse counsel.

3. That there are important issues and facts which Plaintiff's counsel feels the Court should be appraised of regarding the order for blood tests in this cause. Specifically, Plaintiff requests that the Court order the Defendant to submit himself to an HLA blood test, the expense of which will be borne by the Plaintiff.

CERTIFICATE OF SERVICE
(Omitted in printing)

HORNE & PEPPEL, P.C.

/s/ _____

HAROLD W. HORNE
474 S. Perkins Extd. #205
Memphis, Tennessee 38117
761-3140

IN THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY, TENNESSEE

Docket No. 31870
Circuit Court 64761-4 R.D.

FRANCES ANNETTE PICKETT, PLAINTIFF

vs.

BRAXTON BROWN, DEFENDANT.

ORDER REQUIRING PLAINTIFF TO SUBMIT TO BLOOD TESTS—January 21, 1980

This cause was heard Tuesday, January 8, 1980, before the Honorable Kenneth A. Turner, Judge of the Juvenile Court upon Plaintiff's motion for a re-hearing. After argument of counsel for each of the parties, it was the opinion of the Court that the Plaintiff should submit to a blood test of the Defendant's choosing as soon as possible. The Court is further of the opinion that its ruling as to any Constitutional matters should not be made until the results of the blood tests are determined.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiff shall submit to Dr. Argall's standard blood grouping tests, the participation of the plaintiff and her child to be arranged for by the plaintiff and paid for by defendant, the defendant having earlier submitted to this test.

/s/ _____
KENNETH A. TURNER—JUDGE
DATE: January 21, 1980

/s/ _____
HAROLD W. HORNE
Attorney for Plaintiff

/s/ _____
JAMES R. MCGARRH, JR.
Attorney for Defendant

IN THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY, TENNESSEE

No. 31870

JEFFREY LEE PICKETT BY NEXT FRIEND, FRANCES ANNETTE PICKETT, AND FRANCES ANNETTE PICKETT, MOTHER OF JEFFREY LEE PICKETT, PLAINTIFF,

vs.

BRAXTON BROWN, DEFENDANT.

ORDER DECLARING A PORTION OF T.C.A. 36-224 (2) UNCONSTITUTIONAL AND AMENDING PLAINTIFF'S PETITION—April 24, 1980

I

Frances Annette Pickett has filed a petition to establish paternity pursuant to Tennessee Code Annotated § 36-222 et seq. alleging that Braxton Brown is the natural father of her son, Jeffrey Lee Pickett, born November 1, 1968. This petition was filed May 24, 1978, roughly ten years after Jeffrey's birth.

Braxton Brown denied paternity and in reply alleged that he "has never, in or by any writing or other means, acknowledged or furnished any support to Jeffrey Lee Pickett, born November 1, 1968, to Frances Annette Pickett." Based upon this answer, the Defendant moved to dismiss this paternity suit based upon the two year statute of limitations set out in Tennessee Code Annotated § 36-224 (2).

Plaintiff replied by filing a motion challenging the constitutionality of the two year statute of limitations as set out in Tennessee Code Annotated § 36-224 (2) and further moving to amend her petition to also bring the paternity suit as next friend in behalf of her child. Notice was given to the Attorney General of Tennessee who intervened to uphold the statute's constitutionality. The parties are all in agree-

ment that if the statute of limitations is constitutional, this petition to establish paternity must be dismissed.

This Court finds that the two year statute of limitations as set out in Tennessee Code Annotated § 36-224 (2) violates the equal protection clause of the United States Constitution as well as Article 1, Section 8 and Article 11, Section 8 of the Tennessee Constitution and accordingly so rules.

II

A child born out of lawful wedlock has a right to support from his father. Tennessee Code Annotated § 36-223, *Brown* v. *Thomas* (1968), 221 Tenn. 319, 426 S.W. 2d 496. His mother as caretaker and natural guardian merely serves as a proper person to receive the support benefits due and owing a child born out of lawful wedlock, and she can not contract away the child's right or release the putative father's obligation. *Reynolds* v. *Richardson* (App. 1971), 483 S.W. 2d 747, cert. denied, *Reynolds* v. *Tennessee* (1973), 410 U.S. 944, 35 L. Ed. 2d 611, 93 S. Ct. 1381. A right of a child born out of lawful wedlock to obtain support is a continuing right until the child reaches the age of 18 years. This right may be enforced by a paternity suit under Tennessee Code Annotated § 36-222 et seq., which is both an action to determine paternity and an action for child support. Tennessee Code Annotated § 36-224 (2) imposes a two year statute of limitations within which the right of a child born out of lawful wedlock to parental support must be asserted, *unless the child is or is about to become a public charge*, but no such limitation is imposed on the support rights of a child born in wedlock who has a court enforceable right to support in Tennessee until age 18. By enacting this statutory limitation on the time in which paternity actions may be brought, the Legislature is treating children born out of lawful wedlock differently from children born in wedlock. Because of this statute, the rights of a child born out of wedlock to support may be foreclosed forever by the failure of his mother to file a suit through her ignorance, neglect, or collusion with the father and through no fault of the child.

The State, through the Attorney General, argues that the two year statute of limitations is essentially a rule founded upon the State's legitimate interest in preventing litigation of stale or spurious claims.

Two important State objectives are in conflict: the State's interest in the welfare of its children versus the State's interest in preventing stale claims. The child's welfare is paramount. If this child was, or was about to become, a public charge, the State or any person (pursuant to Tennessee Code Annotated § 36-224 (2)) could bring a paternity petition against Braxton Brown. Certainly the possibilities of fraud, perjury, or litigation of stale claims is no more inherent in a case brought by a child who is not receiving public assistance than by a case brought for a child who is a public charge.

The Attorney General further argues that the State has a strong interest in protecting the public treasury and in assuring that at least one person will be financially responsible for a child. This interest does not exist when the child is not a public charge and is supported by its mother or some other person. When the child requires welfare payments to subsist, however, the State acquires a strong interest in identifying the father.

This argument contradicts itself and does not serve the public policy of Tennessee. Were this case to be dismissed based upon the two year statute of limitations, Frances Annette Pickett would be encouraged to quit her employment and join the welfare rolls in order to legitimate her child. In fact, this entire controversy could be circumvented by Ms. Pickett's terminating her employment and applying for welfare. Thus, were the two year statute of limitations to be constitutional, it would encourage the mothers of children born out of wedlock to seek public assistance in order to bring paternity proceedings.

III

Not only does the statute of limitations discriminate between children born in and out of wedlock, but it further discriminates between children born out of wedlock who are receiving public assistance and such children whose

mothers are not receiving public assistance. Both parents are obligated to support their children. The fact that one parent is supporting a child does not terminate the other parent's obligations to contribute toward the support of the child. Under the present statute, a child who relies on the State welfare rolls for his subsistence may be legitimated at any time prior to his 18th birthday. A child who is not supported by the State, however, may be legitimated only up to his second birthday—unless his father acknowledges paternity.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That Petitioner, Frances Annette Pickett, is allowed to amend her complaint to bring this petition to establish paternity in her name and in the name of her child by her as next friend;

2. That the portion of Tennessee Code Annotated § 36-224 (2) which provides an action shall not be brought after this lapse of more than two (2) years from the birth of this child, unless paternity as been acknowledged by the father in writing or by the furnishing of support is unconstitutional;

3. The Attorney General and the Defendant have prayed an interlocutory appeal from this order pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure and Tennessee Code Annotated § 16-408. It is hereby certified that the constitutionality of the statute of limitations as set forth in Tennessee Code Annotated § 36-224 (2) is the sole determining question of law in the present proceedings, and that there is substantial ground for difference of opinion as to this issue. An immediate appeal from the present order may materially advance the ultimate determination of the litigation and result in a net reduction in the duration and expense of this litigation if the present order is reversed, since the existence of the statute of limitations will affect the entire conduct of the trial proceedings and the nature of the evidence on which the Court must base its decision. Furthermore, the practice in other courts is now inconsistent with the present order, and there is need to develop a uniform body of law in this area.

It is therefore ordered that an interlocutory appeal is hereby granted on the issue of whether the statute of limitations as set forth in Tennessee Code Annotated § 36-224(2) is constitutional.

ENTERED this 24 day of April, 1980.

/s/ _____
JUDGE KENNETH A. TURNER

APPROVED FOR ENTRY:

/s/ _____
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Attorney for Plaintiff
474 S. Perkins Extd. Suite 205
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/s/ _____
LEE BRECKENRIDGE
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IN THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY, TENNESSEE

Docket No. 31870
Circuit Court No. 64761-4 R.D.

FRANCES ANNETTE PICKETT, PLAINTIFF,

vs.

BRAXTON BROWN, DEFENDANT

STATEMENT OF THE EVIDENCE

Pursuant to Rule 24(c) of the Tennessee Rules of Appellate Procedure, the defendant and the intervenor Attorney General submit the following statement of the evidence or proceedings:

The plaintiff, Frances Annette Pickett, brought suit in Juvenile Court against the defendant Braxton Brown, seeking an order declaring the defendant to be the father of her child and requiring him to pay child support. The defendant denied paternity and the case was transferred to Circuit Court for a jury trial under T.C.A. § 36-227. The plaintiff filed a motion for summary judgment, attaching the affidavit of Frances Annette Pickett, representing that the defendant was the father of her child. The defendant filed a motion to dismiss, contending that the action was barred by the two-year statute of limitations set forth in T.C.A. § 36-224(2). Without ruling on these motions, the Circuit Court remanded the case to Juvenile Court. In Juvenile Court, the plaintiff filed a motion seeking a declaration by the Court that the two-year statute of limitations relied upon by the defendant was unconstitutional. The Attorney General received notice and intervened to defend the constitutionality of the statute. The parties' motions were heard by the Juvenile Court referee, who found in favor of the plaintiff and held that the defendant's motion to dismiss should be overruled. The defendant requested a rehearing before the judge of the Juvenile Court. The Juvenile Court ordered a continuance pending completion of

blood tests of the parties, but the results of the blood tests were not introduced into evidence. The Juvenile Court subsequently held unconstitutional the two-year statute of limitations set forth in T.C.A. § 36-224(2) and granted permission for an immediate appeal. Aside from the affidavit of Frances Annette Pickett submitted with the plaintiff's motion for summary judgment in Circuit Court, no evidence has been introduced in the trial court in this action.

The undersigned hereby certify the foregoing statement of the evidence as an accurate account of the proceedings in the trial court, to the best of their knowledge and information.

Respectfully submitted,

/s/_____

LEE BRECKENRIDGE
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

/s/_____

JAMES R. MCGARRH, JR.
Attorney for Defendant

CERTIFICATE OF SERVICE (omitted in printing)

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

No. D-31870

FRANCES ANNETTE PICKETT, PLAINTIFF-APPELLEE,

v.

BRAXTON BROWN, DEFENDANT-APPELLANT,

WILLIAM M. LEECH, JR., INTERVENOR-APPELLANT

ORDER—June 9, 1980

Upon consideration of the joint application for permission to appeal, it is the decision of this Court that the application be and the same is hereby granted.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE AT JACKSON

For Publication
August 30, 1982.

SHELBY JUVENILE
HON. KENNETH A. TURNER, JUDGE.

FRANCES ANNETTE PICKETT, PLAINTIFF-APPELLEE

vs.

BRAXTON BROWN, DEFENDANT-APPELLANT
WILLIAM M. LEECH, JR., INTERVENOR-APPELLANT

For Plaintiff-Appellee:
Harold W. Horne
Memphis, Tennessee

For Defendant-Appellant:
James R. McGarrh, Jr.
Memphis, Tennessee

For Intervenor-Appellant:
Lee Breckenridge
Assistant Attorney General
Nashville, Tennessee

OPINION—Aug. 30, 1982

REVERSED and DISMISSED. DROWOTA, J.

This appeal seeks to uphold the constitutionality of the two-year statute of limitations upon an action to establish paternity, found in TCA § 36-224(2).[1] The action was brought in May, 1978, to establish the paternity and obtain

[1] The statute reads:

> Proceedings to establish the paternity of the child and to compel the father to furnish support and education for the child may be instituted during the pregnancy of the mother or after the birth of the child, but shall not be brought after the lapse of more than two (2) years from the birth of the child, unless paternity has been acknowledged by the father in writing or by the furnishing of support. Provided, however, that the department of human services or any person shall be empowered to bring a suit in behalf of any child under the age of eighteen (18) who is, or is liable to become a public charge.

an order for support of a child born in November, 1968. The defendant argued that since the action was brought more than two years after the child's birth, and he had never acknowledged the child in writing or by furnishing support, the action was barred. The plaintiff mother filed a motion challenging the constitutionality of the section. She sought to amend her petition so as to bring it in the name of the child.

Plaintiff's grounds for urging unconstitutionality were: (1) that the two-year period denied her and her son equal protection of the law under the federal and state constitutions; (2) that it amounted to cruel and unusual punishment (not seriously pressed by plaintiff); and (3) that it deprived the child of due process of law in cutting off his rights before he was old enough to exercise them. Her argument was basically that children born out of wedlock were denied substantial benefits accorded to other children, since children born in wedlock may sue their fathers for support throughout their minority.

The Attorney General was allowed to intervene, since constitutionality was in issue. He argued that plaintiff had no standing to challenge the constitutionality of the exception for public charges, but that in any event, such exception was constitutional as an extension of the sovereignty of the state and because there was a rational basis for making this exception. Further, the general two-year period was constitutional because it was not a limitation upon illegitimates' right to support, which was equal to that of legitimate children. Rather, the limitation was upon establishing paternity, and was justified by the state's interest in preventing litigation of stale or spurious claims. The defendant separately argued that the statute merely limited "the time in which a mother who is able to support her child may seek reimbursement from the alleged father," and the time in which the State may seek reimbursement.

The juvenile court allowed the child to be added as a plaintiff, and held the two-year portion of the statute unconstitutional. The effect is to allow an action to be brought throughout the child's minority. The court reasoned that an illegitimate child has a right, continuing throughout minori-

ty, to support from his father. The right is enforced by an action brought under TCA § 36-222. However, such an action must, in general, be brought within two years of the child's birth, while no such limitation is imposed upon a child born in wedlock. The result is that the Legislature has treated illegitimate children differently than legitimate children. Additionally, an illegitimate child's right to support may be cut off by his mother's failure to act, with no fault on the part of the child.

The trial court also ruled that the two-year period put two state interests—the welfare of its children and preventing stale claims—in conflict. The court held that the stale claim reasoning failed because the state or any person may sue during eighteen years, when the child becomes a public charge. The court also found discrimination between children born out of wedlock, some of whom are public charges and some of whom are supported privately; even if the mother did support the child, this did not terminate the father's equal obligation to support.

The court allowed an interlocutory appeal by certifying that the constitutionality of TCA § 36-224(2) was the sole determinative question of law in the proceedings. TRAP 9, TCA § 16-408.

In ruling on the equal protection challenge to the statute, we begin our discussion with *Mills v. Habluetzel*, 50 U.S.L.W. 4372 (April 5, 1982).[2] This case held unconstitu-

[2] Because of the clarity and relevance of the *Mills* opinion we do not find it necessary separately to review and comment upon the line of cases decided by the Court in recent years, dealing with classifications based upon illegitimacy. *See Lalli v. Lalli*, 439 U.S. 259, 99 S. Ct. 518, 58 L. Ed. 2d 503 (1978); *Trimble v. Gordon*, 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977); *Mathews v. Lucas*, 427 U.S. 495, 96 S. Ct. 2755, 49 L. Ed. 2d 651 (1976); *Jimenez v. Weinberger*, 417 U.S. 628, 94 S. Ct. 2496, 41 L. Ed. 2d 363 (1974); *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619, 93 S. Ct. 1700, 36 L. Ed. 2d 543 (1973); *Gomez v. Perez*, 409 U.S. 535, 93 S. Ct. 872, 33 L. Ed. 2d 56 (1973); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 92 S. Ct. 1400, 31 L. Ed. 2d 768 (1972); *Labine v. Vincent*, 401 U.S. 532, 91 S. Ct. 1017, 28 L. Ed. 2d 288 (1971); *Levy v. Louisiana*, 391 U.S. 68, 88 S. Ct. 1509, 20 L. Ed. 2d 436 (1968); *Glona v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73, 88 S. Ct. 1515, 20 L. Ed. 2d 441 (1968).

tional a Texas statute, § 13.01 of Chapter 13, Title 2 of the Texas Family Code:

> A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred.

This statute was challenged on equal protection and due process grounds. Upholding the equal protection challenge, the Court did not discuss the due process issue.

The Texas Family Code, governing determinations of paternity and entitling illegitimate children to seek such a determination and establish a paternal duty of support, was Texas' response to the Court's earlier opinion in *Gomez v. Perez*, 409 U.S. 535, 93 S. Ct. 872, 35 L. Ed. 56 (1973). Before *Gomez*, illegitimates in Texas had had no judicially enforceable right to support from the natural father. As the Court stated in *Gomez*,

> ... a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.

Id. at 538, 35 L. Ed. 2d at 60.

Thus, in *Mills*, the Court had to determine whether it was constitutional for Texas to grant a right to legitimation and support, but then place a one-year statute of limitations upon the bringing of the action. The Court held that this scheme was unconstitutional. "It would hardly satisfy the demands of equal protection and the holding of *Gomez* to remove an 'impenetrable barrier' to support, only to replace it with an opportunity so truncated that few could utilize it effectively." 50 U.S.L.W. at 4373. Although Texas law permitted the paternity action to be brought by any person with an interest in the child, the mother would usually be the person who would sue. For her, there would be such obstacles to bringing a suit within a year that she

would effectively be denied the opportunity to sue. The hindrances listed by the Court included financial difficulties, continuing affection for the father, shame and embarrassment, and confusion. Since *any* suit had to be brought within a year, such time was not long enough for the state, once a claim should be assigned to it, to take steps to sue.

The Court also held that one year was "not substantially related to the State's interest in avoiding the prosecution of stale or fraudulent claims." *Id.* at 4374. Problems of proof do not "justify a period of limitation which so restricts those rights as effectively to extinguish them." *Id.*

Considering this holding, we look at other language in the Court's opinion which would cast light upon a two-year limitation:

> The fact that Texas must provide illegitimate children with a bona fide opportunity to obtain paternal support does not mean, however, that it must adopt procedures for illegitimate children that are coterminous with those accorded legitimate children. Paternal support on behalf of illegitimate children contain an element that such suits for legitimate children do not contain: proof of paternity. Such proof is often sketchy and strongly contested, frequently turning upon conflicting testimony from only two witnesses. Indeed, the problems of proving paternity have been recognized repeatedly by this Court. *Parham v. Hughes*, 441 U.S. 347, 357, 361 (1979); *Lalli v. Lalli*, 439 U.S. 259, 269 (1978); *Trimble v. Gordon*, 430 U.S. 762, 772 (1977); *Gomez v. Perez*, [409 U.S.] at 538.
>
> Therefore, in support suits by illegitimate children more than in support suits by legitimate children, the State has an interest in preventing the prosecution of stale or fraudulent claims, and may impose greater restrictions on the former than it imposes on the latter. Such restrictions will survive equal protection scrutiny to the extent they are *substantially related to a legitimate state interest.* See *Lalli v. Lalli, supra*, at 265; *Trimble v. Gordon, supra*, at 767, *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). The State's interest in avoiding the litigation of stale or fraudulent claims will justify those periods of limitation that are sufficiently long to present *a real threat of loss or diminution of*

evidence, or an increased vulnerability to fraudulent claims.

> The equal protection analysis . . ., therefore, focuses on two related requirements. *First, the period for obtaining support . . . to illegitimate children must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf. Second, any time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims.*

Id. at 4373-4374 (emphasis added).

During the pendency of the *Mills* case, the Texas Legislature increased the limitation period from one to four years. Thus, five Justices joined in a separate opinion to specify that by disapproving of a one-year statute, the Court did not wish to imply approval of a period longer than one year. We take this to mean simply that the Court does not wish to prejudge any other period or any other statute, but would consider each one on its own merits and how well it meets the problems discussed by the Court in *Mills*. The separate opinion notes the Court's listing of circumstances surrounding the birth of an illegitimate child, which made a one-year period unconstitutional. However, other circumstances could continue for a longer period after birth.

One circumstance was the state's interest, in addition to preventing stale and fraudulent claims, in insuring that genuine claims are satisfied. This strong interest in doing justice and reducing the number of people on the welfare rolls, is "peculiar to the State itself." *Id.* at 4375.

A second point favoring a longer period was the fact that a paternity suit was one of the few causes of action under Texas law where the limitation period was not tolled during the minority of the plaintiff. "Of all the difficult proof problems that may arise in civil actions generally, paternity, an issue unique to illegitimate children, is singled out for special treatment." *Id.*

A third factor which could exist past the first year of life was the relationship among the parties: a continuing relationship between the parents, financial support from the fa-

ther, or perhaps the child's living with the father or his relatives.

In examining the constitutionality of a two-year, as opposed to a one-year, statute, it would also be instructive to review various state court decisions, even though these preceded the *Mills* decision.

1. The period held constitutional in *In re People in the Interest of L.B.*, 179 Colo. 11, 498 P.2d 1157 (1972), *appeal dism. sub nom. Colorado in the Interest of L.B. v. L.V.B.*, 410 U.S. 976, 93 S.Ct. 1497, 36 L.Ed. 2d 173 (1973), was five years from the child's birth, unless the father had acknowledged paternity in writing or by furnishing support. The Colorado Supreme Court distinguished the duty of support, owed equally to legitimate and illegitimate children, from the threshold establishment of the paternal relationship, a duty borne by illegitimates only. The burden of proving this relationship and thus the obligation to support is greater "where paternity is denied by the putative father. The difference in the two situations and the uncertainty of relationship attendant on illegitimacy is sufficient to justify treatment as two different classes for constitutional purposes." 498 P.2d at 1161.

The court held, with citations, that legislatures may enact statutes of limitations which "put infants and adults on the same footing, ... and this is the effect of a statute containing no savings clause exempting infants." *Id.*

2. A landmark state case on this subject is *Cessna v. Montgomery*, 63 Ill. 2d 71, 344 N.E.2d 447 (1976). The Illinois Code provided that *once paternity was established*, legitimate and illegitimate children had an equal right to support. An action to determine paternity had to be brought within two years after the child's birth, *except* that where the father had acknowledged the child under oath or provided support, the action could be brought within two years of such an act on the father's part. The putative father's absence from Illinois also tolled the running of the statute.

The mother challenged the limitation on equal protection and due process grounds. The court reviewed the United States Supreme Court cases decided prior to that time, the most relevant of which was *Gomez v. Perez*, *supra*, noting

that "[t]his appeal, therefore, picks up where *Gomez* left off. The broad question here is to what extent a State may limit or burden the right of an illegitimate child to bring a paternity action." 344 N.E.2d at 452. The court was aware

> [t]hat proof of paternity places a burden on illegitimate children not shared by legitimate children . . .; it is also unavoidable. (H. Krause, Illegitimacy: Law and Social Policy 82 (1971); Note, *Illegitimacy and Equal Protection*, 49 N.Y.U.L. Rev. 479, 511 (1974).) Illegitimate children differ fundamentally from legitimate children in that at birth they have no legal relationship to their natural father. In the language of equal protection analysis, legitimate and illegitimate children are not similarly situated classes. It is not only entirely reasonable but essential that the State require proof of the paternity of illegitimates as a condition to asserting an otherwise equal support right.

Id. at 451-452.

The reasoning employed by the Illinois court in testing the validity of the two-year limitation period is quite similar to that found in *Mills v. Habluetzel*. First, a state may constitutionally limit the time during which an illegitimate child may bring a paternity action. Second, the court recognized the propriety of the state's interest in preventing litigation of stale or fraudulent claims. Third, it was stated that the Legislature could establish "any limitation period it deems appropriate so long as it is not so short as to be tantamount to the impenetrable barrier proscribed in *Gomez*." *Id.* So long as a limitation period cannot be said as a matter of law to be too brief, a court has no power to substitute its judgment for that of the Legislature. "The fact that the support right potentially forfeited is an important one does not authorize this court to select a longer period. We could only remove the limitation altogether . . . ." *Id.*

In light of these principles, basically the same as those voiced by the Supreme Court in *Mills*, the court found that Illinois' two-year statute did not unconstitutionally deny equal protection. The Constitution did not "compel" the court to strike down the statute, *id.* A state study had found, "even with the two-year period, that paternity actions are beset with coercion, corruption and perjury. . . . It

may well be that the longer the period between birth and suit the greater the possibility of fraud. At the very least, a defendant's problems of proof are substantially increased." *Id.*

The due process discussion found in *Cessna* will be mentioned below.

3. The Iowa Supreme Court held its statute constitutional in *State v. Witkowski*, 256 N.W.2d 216 (Iowa 1977), which relied heavily upon the *Cessna* opinion. The statute, § 675.33 of the Iowa Code, read:

> Proceedings to enforce the obligation of the father shall not be brought after the lapse of more than two years from the birth of the child, unless paternity has been judicially established, or has been acknowledged by the father in writing, or by the furnishing of support.

After reviewing the United States Supreme Court cases which had been decided, the court found that the two-year statute did not amount to an insurmountable barrier such as that which had existed in *Gomez v. Perez*, *supra*. It was, instead a *method* of proof and time limitation for proving paternity. Agreeing with the rationale found in *Cessna*, the court found that the Iowa statute was " 'carefully tuned to alternative considerations,' " 256 N.W.2d at 224, a factor which had been found important in United States Supreme court cases. This statute was "carefully tuned" because it provided three exceptions to the two-year period, thus alleviating potential hardships to illegitimates who fit within such exceptions.

4. *Thompson v. Thompson*, 285 Md. 488, 404 A.2d 269 (1979), *app. dismissed*, 444 U.S. 1062, 100 S. Ct. 1002, 62 L. Ed. 2d 745 (1980), upheld Maryland's statute requiring action to be brought within two years of the child's birth, except where the putative father had acknowledged paternity in writing or had provided support, in which case the suit could be brought within two years of the last such act by the father. Md. Code Art. 16, § 66(e) (1973). The statute was part of a revision of the law which had as one of its purposes "the promotion of the general welfare and best interests of [illegitimate] children by securing to them, *as near*

as practical, the same right to support, care and education as legitimate children." *Id.*, § 66A (emphasis added). The court discussed the purpose of statutes of limitations; as to the statute specifically in question, it noted:

> Memories do fade with the passage of time. Circumstances change, too. After the lapse of a number of years from contact with the mother of an illegitimate child an accused male might have substantial difficulty in establishing that he was not the only individual who could have sired the child in question. This might be because changed family circumstances could cause individuals who previously would have so testified to be unwilling to state that they had sexual intercourse with the child's mother at a time when they could have sired the child in question. . . . We find no fundamental right of the child affected by this statute.

404 A.2d at 273. *Thompson* also discussed the due process challenge, with which we shall deal below.

5. An interesting interpretation of legislative purpose is found in *Matter of Mores v. Feel*, 73 Misc. 2d 942, 343 N.Y.S. 2d 220 (Fam. Ct. N.Y. Co. 1973). Under § 517 of the New York Family Court Act, action had to be brought within two years after the child's birth, unless the father had acknowledged paternity in writing or by furnishing support. However, if the mother or child was or was likely to become a public charge, the public welfare officials could sue within ten years after the birth. In this case, the putative father challenged the constitutionality of this distinction, which affected the liability of a father based upon the mother's income level.

The court criticized *Matter of Wales v. Gallan*, 61 Misc. 2d 681, 306 N.Y.S.2d 614 (Fam. Ct. Richmond Co. 1969). That case had held the two-year period unconstitutional, extending the limit for any suit to ten years. That case was never reviewed by a higher court, so did not become precedent. The *Mores* case found that *Wales* had not correctly analyzed the legislative purpose and related it to the classification created by the statute. *Mores* held that the legislative purpose was clearly not to assure to all illegitimates an equal chance of establishing paternity, or to make all putative fathers equally liable to paternity suits. Rather, it was

more likely to assure that illegitimates were supported and educated by someone (mother, father, or public welfare), and to protect society by preventing the child from becoming a public charge if one of the other sources of private support was available (*citing* 10 Am. Jur. 2d *Bastards* § 75 (1963)). The statute seemed to the *Mores* court a very rational means of fulfilling such an objective.

The fact that the Legislature could have subjected the state to the same two-year period did not render unconstitutional the use of two different periods.

The court also noted the serious due process problem—that of obtaining proof—created for the father by a possible ten-year lapse. However, even the distinct possibility that after ten years many men would be subjected "to what is potentially a drumhead trial," 343 N.Y.S.2d at 226, did "not compel the conclusion that the 10-year statute was unconstitutional under the Due Process Clause," *id.*

The plaintiff mother in the case at bar argues, in addition to her equal protection challenge, that Tennessee's statute of limitations results in an unconstitutional denial of due process of law under the federal and state Constitutions. She states,

> The statute of limitations as drafted allows a child's right to paternal support to terminate before the child has any real opportunity to assert it. Permitting a child's mother to institute paternity proceedings in behalf of her offspring does not satisfy the requirements of due process because the mother's short term interests, i.e., continuing fondness for the father or her reluctance publicly to reveal her indiscretion, may conflict with the child's long term interests of support and legitimation.[3]

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[3] TCA § 36-224(1) allows suit to be brought by the mother or her personal representative. If the child is likely to become a public charge, suit may be brought by the state department of human services or by any person. If the mother is dead or disabled, suit may be brought by the child through a guardian or next friend.

The Supreme Court in *Mills*, *supra*, did not reach the due process issue because it held that Texas' one-year statute denied equal protection. However, since it held that a state could enact a limitation period shorter than a child's minority, 50 U.S.L.W. at 4373; and because it recognized that "during the child's early years [a paternity action] will often be brought by the mother," *id.* at 4374, we conclude by inference that to allow the mother to sue, and to grant her a time shorter than the child's minority, would not in and of itself be any more unconstitutional on due process grounds than it would be on equal protection grounds. The inquiry, then, remains essentially the same: whether the state's policy as reflected in the statute affords a fair and reasonable opportunity for the mother to decide in a rational way whether or not the child's best interest would be served by her bringing a paternity suit.

Other courts have addressed this issue and found such a statutory scheme constitutional. We quote at length from *Cessna* v. *Montgomery*, *supra:*

> The question, of course, is whether authorizing only the mother to bring suit unreasonably hinders the child's opportunity to secure support from his natural father. Obviously, the action must be brought by some person on the child's behalf, for the child cannot do so himself within the limitation period. And, we note parenthetically, it is within the competence of the legislature to enact a limitation period not tolled during minority. [Citations.]
>
> Possible legislative alternatives would include authorizing an action by a next friend or guardian. Plaintiffs argue that under no circumstances should the mother be permitted to sue on behalf of the child since their interests are potentially adverse. (See H. Krause, Illegitimacy: Law and Social Policy 113, 151-52 (1971); Note, *Illegitimacy and Equal Protection*, 49 N.Y.U.L. Rev. 479, 530 (1974); Gray & Rudovsky, *The Court Acknowledges the Illegitimate: Levy* v. *Louisiana and Glona* v. *American Guarantee & Liability Insurance Co.*, 118 U.Pa.L. Rev. 1, 25 (1969).) Her continuing fondness for the father or her reluctance to publicly reveal her indiscretion could re-

> sult in a decision to forego an otherwise viable suit. We do not deny this possibility exists. Yet plaintiffs' argument assumes that the child's interest is always best served by prompt suit against the father. Society still regards an illegitimate birth as something of a scandal, however, and the best interests of the child in a particular case may not always lie in the direction of public action against the natural father. It seems to us that the mother is ordinarily best positioned to make this difficult decision. Moreover, once a decision has been made to file an action, the interests of mother and child substantially coincide. Support for this conclusion is to be found in *Pittman* v. *United States* (9th Cir. 1965), 341 F.2d 739, where the court held a minor's tort claim against the government could constitutionally be barred after two years although he had no guardian *ad litem*, and despite a claimed conflict of interest that may have caused the father to subordinate his son's interest. The court specifically rejected plaintiff's contention that his right was meaningless because he could not act for himself during his minority.
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> In our judgment the General Assembly could reasonably conclude that the support right of an illegitimate child is best protected by requiring the action to be brought by the mother, and that the potential harm to putative fathers defending stale claims is, on balance, greater than the potential harm to illegitimate children whose support right is forfeited by the mother's inaction.

344 N.E.2d at 453. The highest court of Maryland agreed with this reasoning in a discussion found in *Thompson* v. *Thompson*, *supra*, 404 A.2d at 273.

In *Reynolds* v. *Richardson*, 483 S.W.2d 747 (Tenn. App. 1971), *cert. denied*, 410 U.S. 944, 93 S. Ct. 1381, 35 L. ed. 2d 611 (1973), the Court of Appeals held that when the mother and grandparents of an illegitimate child accepted $500 from the parents of the putative father in exchange for their agreement not to bring any action against him, this did not release the *child's* cause of action to establish paternity and for support. The mother had brought an earlier paternity suit which she dismissed upon being paid the $500. The Court of Appeals stated,

> "This statutory duty [of support] inures to the benefit of the child and we do not conceive that the dismissal by the mother of the original warrant could be considered as foreclosing the right to later assert the father's duty to furnish necessary support."
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> There is a distinction to be made between the release or waiver of the claims of the mother, which can validly be accomplished, and a release of the rights of the infant child which, ordinarily, should not be permitted ...
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> ...
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> Accordingly, to the extent that this proceeding is brought by or for the benefit of the mother or maternal grandparents, it will be dismissed.
>
> To the extent that this proceeding is brought by or for the benefit of the infant child, we hold that it is not affected by the above quoted release.

483 S.W.2d at 751-752.

The mother had filed and dismissed the original action very shortly after the child's birth. Thus, it can be distinguished from the case at bar in that the mother could not be said to have had a reasonable time during which to reflect upon and assess what course of action would be in the child's best interests. As a matter of policy, the mother as the party responsible for the child should have the entire two-year limitation period during which to consider a choice which will bind the child. To the extent to which the *Reynolds* opinion appears to hold that no action or decision made by the mother can be allowed to bind the child, it is overruled.

Several state courts have reached a contrary result and held their limitation periods unconstitutional. As mentioned above, *Matter of Wales* v. *Gallan*, *supra*, did so, but has not been looked upon as precedential. Two years was held too short a time during which to allow suit: Mothers might still have, or hope to resume a relationship with the father, or be anticipating voluntary acknowledgment or support from him. In addition to the child's economic interest in establishing paternity, he has a "psychological" interest in knowing who his father is. Turning to the state's countervailing interests in maintaining the limitation, the two-year

period was for the purpose of protecting the putative father from stale claims. This was not rational, because some fathers were subject to a ten-year period. Secondly, the purpose of the ten-year period was to protect the public purse, but the effect of this was to subordinate what should have been the state's primary purpose—protecting the well-being of children. The court's solution was to lengthen the limitation period to ten years for any suit. Thus, the court did *not* hold that illegitimate children had to be treated the same as legitimate children.

The Montana Supreme Court struck down a three-year limitation but retained it as to actions brought by the State. *Montana* v. *Wilson*, 50 U.S.L.W. 2132 (August 8, 1981).

In *Stringer* v. *Dudoich*, 92 N.M. 98, 583 P.2d 462 (1978), the New Mexico Supreme Court held unconstitutional a statute which placed a two-year limitation upon actions for support, except where paternity had been judicially established, or had been acknowledged in writing or by the furnishing of support. There was no limitation upon actions brought by the State.

The court reasoned that illegitimates had the same rights to support as did legitimates. Since there was no time limitation upon the right of a legitimate child to bring an action, *Gomez* v. *Perez* mandated that the same right be extended to illegitimates.

The Florida Supreme Court treated the subject in depth in *State* v. *West*, 378 So. 2d 1220 (Fla. 1979). Section 95.11 (3)(b), Fla. Statutes (1975) required an action to determine paternity to be brought within four years, but under § 95.051 (1)(e), the running of the time was tolled when the putative father made voluntary payments toward support.

The court pointed out that an illegitimate child had a right to support from his father, which right continued until the age of eighteen; and that placing a time limitation upon the enforcement of such resulted in

> the [legislature's] treating legitimate children differently from illegitimate children. Because of this statute, the rights of the illegitimate child to support may be foreclosed forever by failure of his mother to file

> suit through her ignorance, neglect, or sympathy with the father and through no fault of the child.

378 So. 2d at 1222. The court reviewed the then existing Supreme Court opinions to determine that the "substantial relationship" test should be applied in considering whether or not the differing treatment was constitutional.[4]

In this situation, the court could not find a sufficient relationship between this statute and the state's interest in barring state claims, the reason being that the illegitimate's right to support was an ongoing one, continually renewing itself until the child reached eighteen. It was held that requiring suit to be brought within four years created an impenetrable barrier to the child's right, when the state could instead have specified requirements to assure that proof of paternity would be adequate. Besides, the limitation period defeated the state's own interest in children being supported by their natural parents.

In effect, the court held that any limitation period would be unconstitutional because it would result in differing treatment of legitimate and illegitimate children.

We have carefully considered *Mills* v. *Habluetzel*, *supra*, all of the earlier Supreme Court and state court opinions, the various policies and arguments advanced therein, and the arguments of the parties in the case at bar. We do not feel that *Mills* would require a holding of uncon-

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[4] This conclusion seems correct. It is clear that the "strict scrutiny" test has been rejected by the Court, *Trimble* v. *Gordon*, 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977); *Mathews* v. *Lucas*, 427 U.S. 495, 96 S.Ct. 2755, 49 L. Ed. 2d 651 (1976). *Mills* v. *Habluetzel*, *supra*, referred to the limitation as not being "substantially related" to the valid state interest in avoiding litigation of stale or fraudulent claims. When one reads the Supreme Court's numerous opinions concerning classifications based upon legitimacy, one discerns that the Court's objective has been to determine whether there is a rational relationship between the classification and the state interest. However, the relationship must be actual, logical and apparent to the reasonable person. As the Court has put it, "the scrutiny by which their showing is to be judged is not a toothless one, e.g., Jimenez v. Weinberger, 417 U.S. 628, 41 L. Ed. 2d 363, 94 S. Ct. 2496 (1974)," *Mathews* v. *Lucas*, *supra*, 427 U.S. at 511. "In a case like this, the Equal Protection Clause requires more than the mere incantation of a proper state purpose." *Trimble* v. *Gordon*, *supra*, 430 U.S. at 769.

stitutionality here, even though obviously, in the wake of *Mills*, two years becomes the minimum period which could possibly be upheld. It is our opinion that those cases which uphold the constitutionality of limitation periods of two years or longer are the better reasoned. Cases finding unconstitutionality do not appear to recognize a distinction which we feel is important: that between the right to paternal support throughout minority (which exists equally in favor of both legitimates and illegitimates); and the right to establish the identity of the individual who bears such duty of support (wherein legitimates and illegitimates are not similarly situated classes).

In the case of an illegitimate child, the mother (or whoever might sue in her stead) must weigh the circumstances and relationships involved and determine whether it is in the best interests of the child and of herself to bring an action to identify the father, or not to bring an action and assume the entire duty of support herself. The *Mills* case definitively holds that the expressed state interest in having a statute of limitations upon paternity actions—preventing litigation of stale and fraudulent claims—is a valid one. It has held that one year is as a matter of law too short a time for the mother to make a decision, because of financial, emotional and, we might add, physical strains and problems which very often endure through many months after childbirth. Even though these and other circumstances might also endure beyond the first year, we cannot say as a matter of law that the Legislature could not rationally determine that such a possibility became outweighed by the state's interest in prohibiting litigation of stale and fraudulent claims. The Legislature could rationally determine that two years is long enough for most women to have recovered physically and emotionally, and to be able to assess their and their children's situations logically and realistically. It could rationally decide, on the other hand, that to allow longer than two years would unreasonably increase the putative fathers' problems of proof in most cases. Its considerations could include the temporary nature of many relationships outside wedlock; the possibility of the formation of new relationships by the mother, putative father, and

anyone else with whom she might have had relations at the relevant time; the difficulty of producing proof to rebut the mother's testimony; the statistics showing the frequency of false and very subjective testimony in this type of case; and the fact that, by the time two years have elapsed, the mother theoretically could have had another child.

Further, the Tennessee statute is "carefully tuned" to avoid hardship in predictable groups of cases, since it contains an exception for actions against men who have acknowledged their children in writing or by supporting them,[5] and it has been held that in Tennessee, regular or substantial payments are not required in order to constitute "support." *Reynolds* v. *Richardson*, 462 S.W.2d 233 (Tenn. App. 1970). We do not today consider what circumstances outside the statute, if any, could keep the statute from operating in favor of a putative father in a particular case. In any event, the statutory exceptions should satisfy the concerns of the Supreme Court in *Mills*, about conditions persisting beyond one year which could make difficult the bringing of a paternity suit. The state's countervailing interest in doing justice and reducing the number of people on welfare is served by allowing the state a longer time during which to sue. The Court's concern about ongoing relationships among the parties is satisfied by the acknowledgement exceptions. This leaves the Court's concern that the limitation period is unique in not being tolled during the plaintiff's minority, but we do not find that this factor alone requires a holding of unconstitutionality of a two-year period, as opposed to any other period which can end during the plaintiff's minority.

Since the mother is the party primarily authorized by the statute to bring the action, and thus of necessity makes a decision which is binding on the child, we agree with those courts which have held that, for a myriad of reasons, she is the best qualified person to do so. The state has determined that the mother should be allowed to make this important

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[5] TCA § 36-224(2); Justice O'Connor points out in her concurring opinion that the Texas statute does not make exceptions for these "practical obstacles to filing suit within one year."

decision, as it is essentially a private matter. So long as the child is able to be supported privately, the state allows the matter to remain private. If the mother comes to a point where she requires public assistance in order to support the child, the state and its taxpayers acquire an interest which they did not previously have, which accounts for the statute's exception for actions brought by the state.[6]

There are many decisions, both important and minor, arising in many contexts, which are made by parents on behalf of their children. These may have significant and lasting effects upon the children. A woman's decision to shoulder the duty of support and cut herself and the child off from the putative father, is but one example of such a decision. No matter what the limitation period, if it is shorter than the child's minority, the mother would still be the person making or profoundly influencing this decision.

Counsel for the mother in this case raises the possibility that a mother could evade the two-year period by giving up her job, thus losing her source of funds with which privately to support the child; and apply for welfare, thus forcing the state to bring a paternity suit, which can be done throughout the child's minority. Even if this could happen in a few cases, we would note that there are sanctions against abuse of the welfare system; and that such possibility does not render the Legislature's determination to set a two-year period unconstitutional. A mother could resort to such an option no matter how long or short the limitation period.

The mother petitioned to amend her complaint to add the name of the child, by the mother as next friend, as a plaintiff. The court allowed such an amendment, and the defendant and state have not appealed this ruling. However, TCA § 36-224(1) does not permit an action to be brought by the child except in case of death or disability of the mother. This error is harmless, as we hold that this action was barred by the two-year statute of limitations.

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[6] We do not today decide the constitutionality of the eighteen-year exception to the limitation period, from the point of view of a putative father who is sued by the "Department of Human Services or any other person."

We find that the statute of limitations under consideration here meets the test enunciated by the Supreme Court in *Mills:* It is sufficiently long to present a reasonable opportunity for those who may sue, to assert claims on behalf of illegitimate children. Second, the general two-year limitation, although exceptions are provided where other state interests prevail, is substantially related to the state's interest in avoiding the litigation of stale or fraudulent claims. *See Mills, supra*, 50 U.S.L.W. at 4374. Two years, as opposed to one year, is not a period which "remove[s] an 'impenetrable barrier' to support, only to replace it with an opportunity so truncated that few could utilize it effectively." *Id.* at 4373. *Every* illegitimate child can enforce a father's support obligation if a suit to declare paternity is brought, and two years is not, as a matter of law, an unreasonably short time. As the Supreme Court has said in another recent case,

> [f]ew statutory classifications are entirely free from the criticism that they sometimes produce inequitable results. Our inquiry under the Equal Protection Clause does not focus on the abstract "fairness" of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment. . . .
>
> . . . Inheritance [in this case, enforcing the father's support obligation] is barred only where there has been a failure to secure evidence of paternity during the father's lifetime [in this case, within the period of limitations] in the manner prescribed by the State. This is not a requirement that *inevitably disqualifies an unnecessarily large number of children born out of wedlock.*

Lalli v. *Lalli*, 439 U.S. 259, 273, 99 S. Ct. 518, 58 L. Ed. 2d 503 (1978) (emphasis added).

It is not our function to substitute our opinion as to what would be the most desirable policy, for that of the Legislature. TCA § 36-224(2) meets the test of being substantially related to a legitimate state interest. Accordingly, the rulings of the trial court are reversed and this action is dis-

missed. Costs of this appeal shall be borne by the plaintiff-appellee.

Reversed and dismissed.

/s/ FRAN F. DROWOTA, III

FRANK F. DROWOTA, III, *Justice.*

Concur:
Harbison, C.J.
Fones, Cooper and Brock, JJ.

IN THE SUPREME COURT OF TENNESSEE AT JACKSON

SHELBY JUVENILE
REVERSED AND DISMISSED

FRANCES ANNETTE PICKETT, PLAINTIFF-APPELLEE

vs.

BRAXTON BROWN, DEFENDANT-APPELLANT

WILLIAM M. LEECH, JR., INTERVENOR-APPELLANT

JUDGMENT—Aug. 30, 1982

This cause coming on to be heard upon a transcript of the record from the Juvenile Court of Shelby County, briefs and argument of counsel; upon consideration whereof this Court is of opinion that in the judgment of the trial court there is reversible error.

IT IS, THEREFORE, ORDERED AND ADJUDGED by this Court that the rulings of the trial court are reversed and this action is dismissed.

This cause is remanded to the Juvenile Court of Shelby County for the collection of the costs accrued below.

Costs of this appeal are taxed against the plaintiff-appellee, Frances Annette Pickett, for which execution may issue, if necessary.

8/30/82.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

No. Shelby Juvenile 1

FRANCES ANNETTE PICKETT, PLAINTIFF-APPELLEE,

vs.

BRAXTON BROWN, DEFENDANT-APPELLANT,

WILLIAM M. LEECH, JR., INTERVENOR-APELLANT.

NOTICE OF APPEAL
TO
THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the plaintiff-appellee herein, Frances Annette Pickett, appeals to the Supreme Court of the United States the judgment entered in the above styled cause by the Supreme Court of Tennessee on August 30, 1982, upholding the constitutionality of the two (2) year statute of limitations as set forth in Tennessee Code Annotated, § 36-224(2). This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ HAROLD W. HORNE

HAROLD W. HORNE—*Attorney for Plaintiff-Appellee*
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Memphis, Tennessee 38117
(901) 761-3140

Supreme Court of the United States

No. 82-5576

JEFFREY LEE PICKETT, ETC., ET AL., APPELLANTS,

v.

BRAXTON BROWN, ET AL.

APPEAL from the Supreme Court of Tennessee, Western Division.

The statement of jurisdiction and the motion for leave to proceed herein *in forma pauperis* in this case having been submitted and considered by the Court, the motion of appellants for leave to proceed *in forma pauperis* is granted. In this case probable jurisdiction is noted.

DECEMBER 6, 1982